

H. B. 2091

(By Delegate Manchin)

[Introduced January 16, 2015; referred to the
Committee on the Judiciary then Finance.]

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

1 and permitting the liberality of construction.

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

3 That §9-7-6 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and
4 that said code be amended by adding 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 §14-4-11, all to read as follows:

6 **CHAPTER 9. HUMAN SERVICES.**

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

8 **§9-7-6. Civil remedies.**

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

18 (b) No criminal action or indictment need be brought against any person, firm, corporation
19 or other entity as a condition for establishing civil liability hereunder.

20 (c) A civil action under this section may be prosecuted and maintained on behalf of the
21 Department of Health and Human Resources by the Attorney General and the Attorney General's
22 assistants or a prosecuting attorney and the prosecuting attorney's assistants or by any attorney in

1 contract with or employed by the Department of Health and Human Resources to provide such
2 representation.

3 (d) Any person, firm, corporation, partnership, or other legal entity who violates subsection
4 (a), (b) or (c) of this section or section two, article four, chapter fourteen of this code, shall, in
5 addition to any other penalties provided by law, be liable to civil penalties of: (1) Payment of
6 interest on the amount of the excess benefits or payments at the maximum legal rate in effect on the
7 date the payment was made to said person, firm, corporation, partnership or other legal entity for the
8 period from the date upon which payment was made to the date upon which repayment is made to
9 the state; (2) payment of an amount not to exceed three times the amount of such excess benefits or
10 payments, and; (3) payment in the sum of not less than and not more than the civil penalty allowed
11 under section two, article four, chapter fourteen of this code, as it may be adjusted for inflation
12 pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub.L.101-410 for each
13 excessive claim for assistance, benefits or payments.

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

15 **ARTICLE 4. FALSE CLAIMS ACT.**

16 **§14-4-1. Definitions.**

17 For purposes of this article:

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

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

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

1 if the state:

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

3 or

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

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

9 (2) "Employer" includes any natural person, corporation, firm, association, organization,
10 partnership, business, trust or state-affiliated entity involved in proprietary function, including state
11 universities and state hospitals.

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

13 (A) Has actual knowledge of the information;

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

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

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

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

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

22 (6) "Person" means any natural person, partnership, corporation, organization, association,

1 business, trust or other legal entity, including any political subdivision of the state.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 (3) At the time the person provided the state with information about the violation, a criminal
18 prosecution, civil action or administrative proceeding had not commenced with respect to the
19 violation, and the person did not have actual knowledge of the existence of an investigation into the
20 violation.

21 **§14-4-3. Attorney General investigations and prosecutions; powers of prosecuting authority;**
22 **civil actions by individuals as *qui tam* plaintiff and as private citizens; jurisdiction**

1 of courts.

2 The Attorney General shall diligently investigate alleged violations of subsection (a), section
3 two of this article. If the Attorney General finds that a person has violated or is violating subsection
4 (a) of section two, the Attorney General may bring a civil action under this section against that
5 person.

6 **§14-4-4. Actions by private persons.**

7 (a) A person may bring a civil action for a violation of this article for the person and for the
8 state in the name of the state. The person bringing the action shall be referred to as the *qui tam*
9 plaintiff. Once filed, the action may be dismissed only with the written consent of the court and the
10 Attorney General, taking into account the best interest of the parties involved and the public purposes
11 behind this article.

12 (b) A copy of the complaint and written disclosure of substantially all material evidence and
13 information the person possesses shall be served on the Attorney General. The complaint shall also
14 be filed *in camera*, shall remain under seal for at least sixty days and may not be served on the
15 defendant until the court so orders. The state may elect to intervene and proceed with the action
16 within sixty days after it receives both the complaint and the material evidence and the information.
17 Any information or documents furnished by the relator to the Attorney General in connection with
18 the initiation of a *qui tam* action or investigation under this subsection is not a public record and is
19 exempt from disclosure under chapter twenty-nine-b of this code.

20 (c) The state may, for good cause shown, move the court for extensions of the time during
21 which the complaint remains under seal under subsection (b) of this section. Any such motions may
22 be supported by affidavits or other submissions *in camera*. The defendant may not be required to

1 respond to any complaint filed under this section until after the complaint is unsealed and served
2 upon the defendant pursuant to West Virginia Rules of Civil Procedure.

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

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

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

9 (e) When a person brings a valid action under this section, no person other than the state may
10 intervene or bring a related action based on the facts underlying the pending action.

11 **§14-4-5. Rights of the parties to *qui tam* actions.**

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

15 (b) (1) The state may seek to dismiss the action for good cause notwithstanding the objections
16 of the *qui tam* plaintiff if the *qui tam* plaintiff has been notified by the state of the filing of the
17 motion and the court has provided the *qui tam* plaintiff with an opportunity to oppose the motion and
18 present evidence at a hearing.

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

22 (B) Any award resulting from an action authorized by the court pursuant to paragraph (A)

1 of this subdivision shall be made pursuant to section six of this article.

2 (2) The state may settle the action with the defendant notwithstanding the objections of the
3 qui tam plaintiff if the court determines, after a hearing providing the qui tam plaintiff an opportunity
4 to present evidence, that the proposed settlement is fair, adequate and reasonable under all of the
5 circumstances.

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

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

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

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

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

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

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

1 good cause.

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

9 (e) Notwithstanding section four of this article, the state may elect to pursue its claim through
10 any alternate remedy available to the state, including any administrative proceeding to determine a
11 civil money penalty. If any alternate remedy is pursued in another proceeding, the person initiating
12 the action has the same rights in that proceeding as the person would have had if the action had
13 continued under section four of this article. Any finding of fact or conclusion of law made in such
14 other proceeding that has become final shall be conclusive on all parties to an action under section
15 four of this article. A finding or conclusion is final if it has been finally determined on appeal to the
16 appropriate court of the state, if all time for filing an appeal with respect to the finding or conclusion
17 has expired or if the finding or conclusion is not subject to judicial review.

18 **§14-4-6. Award to *qui tam* plaintiff.**

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

1 action.

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

9 (3) Any payment to a person under subdivision (1) or (2) of this subsection shall be made
10 from the proceeds. Any such person shall also receive an amount for reasonable expenses which the
11 court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All
12 expenses, fees and costs shall be awarded against the defendant.

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

20 (c) Whether or not the state proceeds with the action, if the court finds that the action was
21 brought by a person who planned and initiated the violation of section two upon which the action
22 was brought, then the court may, to the extent the court considers appropriate, reduce the share of

1 the proceeds of the action which the person would otherwise receive under subsection (a) or (b) of
2 this section, taking into account the role of that person in advancing the case to litigation and any
3 relevant circumstances pertaining to the violation. If the person bringing the action is convicted of
4 criminal conduct arising from his or her role in the violation of section two of this article, that person
5 shall be dismissed from the civil action and may not receive any share of the proceeds of the action.
6 The dismissal does not prejudice the right of the state to continue the action.

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

11 (e) Following any distributions under subsections (a) through (d) of this section, all remaining
12 proceeds, including civil penalties awarded under this article, shall be deposited in the general
13 revenue.

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

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

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

21 (c) A person may not bring an action under section four of this article which is based upon
22 allegations or transactions which are the subject of a civil suit or an administrative civil money

1 penalty proceeding in which the state is already a party.

2 (d) (1) The court shall dismiss an action or claim under this section, unless opposed by the
3 state, if substantially the same allegations or transactions as alleged in the action or claim were
4 publicly disclosed:

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

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

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

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

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

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

16 **§14-4-8. State not liable for certain expenses.**

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

19 **§14-4-9. Private action for retaliatory actions.**

20 (a) Any employee, contractor or agent who is discharged, demoted, suspended, threatened,
21 harassed or in any other manner discriminated against in the terms and conditions of employment
22 by the employer of the employee, contractor or agent because of lawful acts done by the employee,

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

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

12 **§14-4-10. Limitation of actions; activities antedating this article; burden of proof.**

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

14 (1) More than six years after the date on which the violation of section two of this article is
15 committed; or

16 (2) More than three years after the date when facts material to the right of action are known
17 or reasonably should have been known by the official of the state charged with responsibility to act
18 in the circumstances, but in no event more than ten years after the date on which the violation is
19 committed, whichever occurs last.

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

1 (c) If the state elects to intervene and proceed with an action brought under section four of
2 this article, the state may file its own complaint or amend the complaint of a person who has brought
3 an action under section four of this article to clarify or add detail to the claims in which the state is
4 intervening and to add any additional claims with respect to which the state contends it is entitled
5 to relief. For statute of limitations purposes, any such state pleading shall relate back to the filing
6 date of the complaint of the person who originally brought the action, to the extent that the claim of
7 the state arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth,
8 in the prior complaint of that person.

9 (d) Estoppel. – Notwithstanding any other provision of law, a guilty verdict rendered in a
10 criminal proceeding charging false statements or fraud, whether upon a verdict after trial or upon a
11 plea of guilty or *nolo contendere*, shall estop the defendant from denying the essential elements of the
12 offense in any action which involves the same transaction as in the criminal proceeding and which
13 is brought under section three or four of this article.

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

19 **§14-4-11. Remedies under other laws; liberality of construction.**

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

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

NOTE: The purpose of this bill is to create the False Claims Act. It provides for *qui tam* proceedings (which are lawsuits brought by private citizens against a person or company who is believed to have violated the law in performance of a contract with the government or in violation of a government regulation, when there is a statute which provides for a penalty for the violations. These proceedings are brought for the state as well as the plaintiff). The bill sets forth prohibited acts, damages, costs and civil penalties. The bill places limitations on damages and sets out the responsibilities of the Attorney General. The bill provides for civil actions by private persons and rights of parties to *qui tam* proceedings, including awards to *qui tam* plaintiffs. The bill bars certain civil actions and provides that the state is not liable for the expenses of private litigants. The bill provides for a private action for retaliatory conduct; it contains a limitation of actions. The bill provides for retroactive application and state intervention in action by private person. The bill provides for estoppel of defenses in certain situations. The bill establishes jurisdiction and venue, and provides for nonexclusivity of action and provides for liberality of construction.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.

Article four is new; therefore, it has been completely underscored.