

ENGROSSED
COMMITTEE SUBSTITUTE
FOR
H. B. 4001

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

(Originating in the Committee on the Judiciary)

[January 10, 2014]

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

Be it enacted by the Legislature of West Virginia:

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

CHAPTER 9. HUMAN SERVICES.

ARTICLE 7. FRAUD AND ABUSE IN THE MEDICAID PROGRAM.

§9-7-6. Civil remedies.

(a) Any person, firm, corporation or other entity which willfully, by means of a false statement or representation, or by concealment of any material fact, or by other fraudulent scheme, devise or artifice on behalf of himself, herself, itself, or others, obtains or attempts to obtain benefits or payments or allowances under the medical programs of the Department of Health and Human Resources to which he or she or it is not entitled, or, in a greater amount than that to which he or she or it is entitled, or any provisions of section two, article four, chapter fourteen of this code, shall, in addition to any other penalties provided by law, be liable to the Department of Health and Human Resources in an amount equal to three times the amount of such benefits, payments or allowances to which he or she or it is not entitled, for civil penalties of (1) payment of interest on the amount of the excess benefits or payments at the maximum legal rate in effect on the date the payment was made to said person, firm, corporation, partnership or other legal entity for the period from the date upon which payment was made to the date upon which repayment is made to the State, (2) payment of an amount not to exceed three times the amount of such excess benefits or payments, (3) payment in the sum of not less than and not more than the civil penalty allowed under section two, article four, chapter fourteen of this code, as it may be adjusted for inflation pursuant to the Federal Civil Penalties Inflation

Adjustment Act of 1990, Pub.L.101-410 for each excessive claim for assistance, benefits or payments, and (4) ~~and shall be liable for the~~ payment of reasonable attorney fees and all other fees and costs of litigation.

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

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

CHAPTER 14. CLAIMS DUE AND AGAINST THE STATE.

ARTICLE 4. GOVERNMENT FRAUD PREVENTION ACT.

§14-4-1. Definitions.

As used in this article, unless the context requires otherwise:

(1) "Attorney General" means the West Virginia Attorney General, deputies, counsels or assistant attorneys general employed by the Office of the Attorney General and designated by the Attorney General to act pursuant to this article.

(2) "Claim" means any request or demand, whether under a contract or otherwise, for money or property, regardless of whether the state has title to the money or property, that (A) is presented to an officer, employee, or agent of the state or (B) is made to a contractor, grantee, or other recipient (i) if the money or property is to be spent or used on the state's behalf or to advance a governmental program or interest and (ii) if the State provides or has provided any

portion of the money or property requested or demanded or will reimburse such contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded. For purposes of this article, "claim" does not include requests or demands for money or property that the state has paid to an individual as compensation for employment with the state or as income subsidy with no restriction on that individual's use of the money or property.

(3) "State" means the State of West Virginia, any agency of state government, and any political subdivision of the state.

(4) "Employee" includes an employee or officer of the State.

(5) "Employer" includes the state.

(6) "Investigation" means any inquiry conducted by an investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of this article.

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

(8) "Obligation" means an established duty, whether or not fixed, arising from (A) an express or implied contractual, grantor-grantee, or licensor-licensee relationship; (B) a fee-based or similar relationship; (C) a statute, regulation or rule; or (D) the retention of any overpayment.

(9) "Person" includes any natural person, corporation, firm, association, organization, partnership, limited liability company, business or trust.

§14-4-2. False Claims; civil penalties.

(a) Any person who:

(1) Knowingly presents, or causes to be presented, 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 material to a false or fraudulent claim;

(3) Conspires to commit a violation of subdivision (1), (2), (4), (5), (6), or (7);

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

(5) Is authorized to make or deliver a document certifying receipt of property used, or to be used, by the State 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 of an obligation or debt, 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 material to an obligation to pay or transmit money or property to the State or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the State;

shall be liable to the state for a civil penalty of not less than \$ 5,500 and not more than \$ 11,000, as may be adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461; Public Law 104-410), plus three times the amount of damages sustained by the State.

(b) A person violating this section shall be liable to the state for reasonable attorney fees and costs of a civil action brought to recover any such penalties or damages. All such fees and costs shall be paid to the Attorney General's Office by the defendant and shall not be included in any damages or civil penalties recovered in a civil action based on a violation of this section.

(c) If the court finds that:

(1) The person committing the violation of this section furnished officials of the state responsible for investigating false claims violations with all information known to the person about the violation within thirty days after the date on which the defendant first obtained the information;

(2) Such person fully cooperated with any state investigation of such violation;

(3) At the time such person furnished the state with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to such violation; and

(4) The person did not have actual knowledge of the existence of an investigation into such violation, the court may assess not less than two times the amount of damages that the state sustains because of the act of that person. A person 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.

(d) For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information,

(1) Has actual knowledge of the information;

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

(3) Acts in reckless disregard of the truth or falsity of the information and require no proof of specific intent to defraud.

(e) This section shall not apply to claims, records or statements relating to state or local taxes.

§14-4-3. Attorney General; investigation, civil action.

The Attorney General shall investigate any violation of section two of this article. If the

Attorney General finds that a person has violated or is violating section two, the Attorney General may bring a civil action under this section.

§14-4-4. Civil actions filed by private persons; state may intervene.

(a) A person may bring a civil action for a violation of section two 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.

(b) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the state. The complaint shall be filed *in camera*, shall remain under seal for at least one hundred twenty 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 one hundred twenty days after it receives both the complaint and the material evidence and information.

(c) The state may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal. Any such motions may be supported by affidavits or other submissions *in camera*. The defendant shall not be required to respond to any motion for judgment filed under this section until twenty-one days after the complaint is unsealed and served upon the defendant.

(d) Before the expiration of the one hundred twenty day period or any extensions obtained under subsection (c), the state shall proceed with the action, in which case the action shall be conducted by the state, or notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to prosecute the action.

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

§14-4-5. Rights of private plaintiff and state.

(a) 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 of this section.

(b) 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 complaint and the court has provided the person with an opportunity for a hearing on the complaint.

(c) 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*. The state may, for good cause shown, move the court for a partial lifting of the seal to facilitate the investigative process or settlement.

(d) 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 (1) limiting the number of witnesses the person may call; (2) limiting the length of the testimony of such witnesses; (3) limiting the person's cross-examination of witnesses; and (4) otherwise limiting the participation by the person in the litigation.

(e) 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.

(f) 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.

(g) 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.

(h) Notwithstanding the provisions of subsection (b) of section four, the state may elect to pursue its claim through any alternate remedy available to the state, including any administrative proceeding to determine a civil money 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 under 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 under this article. For purposes of this subsection, a finding or conclusion is final if it has been finally determined on appeal to a court of competent jurisdiction of the state, if the time for filing an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

§14-4-6. Award to private plaintiff.

(a) Except as hereinafter provided, if the state proceeds with an action brought by a person under section four, 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 that the court finds to be based primarily on disclosures of specific information, other than information provided by the person bringing the action, relating to allegations or transactions in a criminal, civil, or administrative hearing, in a legislative, administrative, or state auditor's report, hearing, audit, or investigation, or from the news media, 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 under this section shall be made from the proceeds of the award. Any such person shall also receive an amount for reasonable expenses that 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.

(b) If the state does not proceed with an action, the person bringing the action or settling

the claim shall receive an amount that 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 award or settlement and shall be paid out of the proceeds. Such person shall also receive an amount for reasonable expenses that 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.

(c) 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 two of this article upon which the action was brought, or if the person bringing the action is convicted of criminal conduct arising from his role in the violation of section two, 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.

(d) 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.

(e) After deducting any distributions made under subsection (a), (b), (c) or (d) of this section, the balance of any funds recovered by the state in an action brought under this article shall be deposited into a special revenue account which is hereby created in the state treasury and shall be known as the "state false claims act fund." The fund shall be administered by the secretary of revenue and all moneys deposited into the fund shall be expended, upon transfer to

the appropriate accounts pursuant to appropriation of the Legislature, allocated in such amounts as may be determined by the Legislature, solely for the purposes of secondary road maintenance, volunteer fire departments and Title XIX waiver for senior citizens.

§14-4-7. Certain actions barred; relief from employment discrimination; waiver of sovereign immunity.

(a) No court shall have jurisdiction over any action brought under this article by an inmate incarcerated within a state or local correctional facility.

(c) No court shall have jurisdiction over an action brought under this article against any department, authority, board, bureau, commission, or agency of the state, any political subdivision of the state, a member of the state legislature, a member of the judiciary, or an exempt official if the action is based on evidence or information known to the State when the action was brought. For purposes of this section, "exempt official" means the Governor, Lieutenant Governor, Attorney General and the secretaries, directors or members of any department, authority, board, bureau, commission or agency of the State or any political subdivision of the state.

(d) In no event may a person bring an action under this article that is based upon allegations or transactions that are the subject of a civil suit or an administrative proceeding in which the state is already a party.

(e) The court shall dismiss an action or claim under four unless opposed by the state if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed in a criminal, civil or administrative hearing in which the State or its agent is a party, in a West Virginia legislative, administrative, or state auditor's 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. For purposes of this section, "original source" means an individual (1) who either prior to a public disclosure has voluntarily disclosed to the state the information on which the allegations or transactions in a claim are based or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions and who has voluntarily provided the information to the state before filing an action under this article.

(f) Except as otherwise provided in this section, the state may not be liable for expenses a person incurs in bringing an action under this article.

§14-4-8. Private action for retaliatory actions.

(a) Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action under this article or other efforts to stop one or more violations of this article.

(b) Relief shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney fees.

(c) Any relief awarded to an employee under this section shall be reduced by any amount awarded to the employee through a state or local grievance process. An action under this section

may be brought in a court of competent jurisdiction for the relief provided in this section, but may not be brought more than three years after the date the discrimination occurred.

(d) This section shall constitute a waiver of sovereign immunity and creates a cause of action by an employee against the State if the state is the employer responsible for the adverse employment action that would entitle the employee to the relief set forth in this section.

§14-4-10. Procedure; statute of limitations.

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under this article may be served at any place in the state.

(b) A civil action under section three or four may not be brought (1) more than six years after the date on which the violation 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, but in that event no more than ten years after the date on which the violation is committed, whichever occurs last.

(c) If the state elects to intervene and proceed with an action brought under section four, the state may file its own complaint or amend the complaint of a person who has brought an action under section four to clarify or add detail to any claim in which the state is intervening and to add any additional claim for which the state contends it is entitled to relief. Any complaint filed by the state pursuant to this subsection shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the state arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in such person's complaint.

(d) In any action brought under section three or four, the state shall be required to prove

all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(e) 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 or *nolo contendere*, shall estop the defendant from denying the essential elements of the offense in any action that involves the same transaction as in the criminal proceeding and which is brought under section three or four.