

H. B. 2072

(By Delegate Marshall)

[Introduced January 12, 2011; referred to the
Committee on the Judiciary.]

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10 A BILL to amend and reenact §9-7-2 and §9-7-6 of the Code of West
11 Virginia, 1931, as amended; and to amend said code by adding
12 thereto a new article, designated §9-7A-1, §9-7A-2, §9-7A-3,
13 §9-7A-4, §9-7A-5, §9-7A-6 and §9-7A-7, all relating to civil
14 actions based upon false or fraudulent claims against the
15 medical programs of the Department of Health and Human
16 Resources; providing definitions; defining acts which create
17 a basis for civil liability; creating a civil penalty for
18 those acts; allowing for reduced damages under certain
19 circumstances; creating a cause of action on behalf of the
20 Department of Health and Human Resources by a private citizen;
21 providing procedure for actions filed by private citizens;
22 providing compensation of private citizens bringing valid
23 actions on behalf of the Department of Health and Human
24 Resources; barring certain actions by private citizens;

1 creating a private cause of action for employer retaliation
2 against a private citizen; specifying limitations on actions,
3 retroactivity of this legislation, burden of proof; and
4 adopting the legislative history behind the federal False
5 Claims Act §§31 U.S.C. 3729-3733.

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

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

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

12 **§9-7-2. Definitions.**

13 For the purposes of this article:

14 (1) "Assistance" means money payments, medical care,
15 transportation and other goods and services necessary for the
16 health or welfare of individuals, including guidance, counseling
17 and other welfare services and ~~shall include~~ includes all items of
18 any nature contained within the definition of "welfare assistance"
19 in section two, article one of this chapter.

20 (2) "Benefits" means money payments, goods, services or any
21 other thing of value.

22 (3) "Claim" means an application for payment for goods or
23 services provided under the medical programs of the Department of
24 ~~Welfare~~ Health and Human Resources.

1 (4) "Medicaid" means that assistance provided under a state
2 plan implemented pursuant to the provisions of subchapter nineteen,
3 chapter seven, Title 42, United States Code, as that chapter has
4 been and may hereafter be amended.

5 (5) "Provider" means any individual or entity furnishing goods
6 or services under the medical programs of the Department of ~~welfare~~
7 Health and Human Resources.

8 (6) "Unit" means the Medicaid fraud control unit established
9 under section one of this article.

10 (7) "Person" includes any natural person, corporation, firm,
11 association, organization, partnership, business or trust.

12 (8) "Employer" includes all agencies and authorities.

13 (9) "Department" refers to the state's Department of Health
14 and Human Resources.

15 (10) "Knowing" or "knowingly" means that a person, with
16 respect to information, has actual knowledge of the information,
17 acts in deliberate ignorance of the truth or falsity of the
18 information, or acts in reckless disregard of the truth or falsity
19 of the information. Proof of specific intent to defraud is not
20 required.

21 **§9-7-6. Civil remedies.**

22 (a) ~~Any person, firm, corporation or other entity which~~
23 ~~willfully, by means of a false statement or representation, or by~~
24 ~~concealment of any material fact, or by other fraudulent scheme,~~

~~1 devise or artifice on behalf of himself, itself, or others, obtains
2 or attempts to obtain benefits or payments or allowances under the
3 medical programs of the department of welfare to which he or it is
4 not entitled, or, in a greater amount than that to which he or it
5 is entitled, shall be liable to the Department of Welfare in an
6 amount equal to three times the amount of such benefits, payments
7 or allowances to which he or it is not entitled, and shall be
8 liable for the payment of reasonable attorney fees and all other
9 fees and costs of litigation. A person or other entity may not:~~

10 (1) Knowingly present or cause to be presented to the medical
11 programs of the Department of Health and Human Resources a false or
12 fraudulent claim for payment or approval;

13 (2) Knowingly make, use or cause to be made or used, a false
14 record or statement to get a false or fraudulent claim paid or
15 approved by the medical programs of the Department of Health and
16 Human Resources;

17 (3) Conspire to defraud the medical programs of the Department
18 of Health and Human Resources by getting a false or fraudulent
19 claim allowed or paid;

20 (4) Possess, or have in the person or other entity's custody
21 or control, property or money used, or to be used by the medical
22 programs of the Department of Health and Human Resources and
23 knowingly deliver or cause to be delivered less property than the
24 amount for which the person received a certificate of receipt;

1 (5) Knowingly make or deliver a receipt that falsely
2 represents property used or to be used by the medical programs of
3 the Department of Health and Human Resources if the person or other
4 entity is authorized to make or deliver a document certifying
5 receipt of the property used or to be used;

6 (6) Knowingly buy, or receive as a pledge of an obligation or
7 debt, public property from an officer or employee of the medical
8 programs of the Department of Health and Human Resources, who
9 lawfully may not sell or pledge the property;

10 (7) Knowingly make, use, or cause to be made or used, a false
11 record or statement to conceal, avoid or decrease an obligation to
12 pay, repay or transmit money to the medical programs of the
13 Department of Health and Human Resources; or

14 (8) Fail to disclose a false claim to the Department of Health
15 and Human Resources within a reasonable time after discovery of a
16 false claim if that person or other entity is a beneficiary of an
17 inadvertent submission of a false claim to the medical programs of
18 the Department of Health and Human Resources and subsequently
19 discovers the falsity of the claim.

20 (b) Any person or other entity found in violation of any
21 provision of subsection (a) of this section is liable to the
22 Department of Health and Human Resources for a civil penalty of not
23 less than \$5,000 and not more than \$10,000 for each false or
24 fraudulent claim, plus an amount equal to three times the amount of

1 the benefits, payments or allowances to which the person or entity
2 is not entitled, and is liable for the payment of reasonable
3 attorney fees and all other fees and costs of litigation.

4 (c) Notwithstanding subsection (b) of this section, the court
5 shall assess at least two times, but not more than three times the
6 amount of benefits, payments or allowances to which the person or
7 entity is not entitled, if the court finds the following:

8 (1) The person who commits the acts furnished the Attorney
9 General with all information known to the person about the acts
10 within thirty days after the date on which the person obtained the
11 information;

12 (2) The person fully cooperated with any investigation of the
13 acts by this state; and

14 (3) At the time the person furnished the Attorney General with
15 information about the violation, no criminal prosecution, civil
16 action, or administrative action had commenced with respect to the
17 violation, and the person did not have actual knowledge of the
18 existence of an investigation into the violation.

19 ~~(b)~~ (d) No A criminal action or indictment need not be brought
20 against any person, firm, corporation or other entity as a
21 condition for establishing civil liability ~~hereunder~~ under this
22 section. Notwithstanding any other provision of law, a guilty
23 verdict rendered in a criminal proceeding charging false statements
24 or fraud, whether upon a verdict after trial or upon a plea of

1 guilty or nolo contendere, estops the defendant from denying the
 2 essential elements of the offense in any action which involves the
 3 same transaction as in the criminal proceeding and which is brought
 4 under this section.

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

11 (f) A private citizen may also bring a civil action under this
 12 section as provided in article seven-a of this chapter.

13 (g) This section shall be liberally construed and applied to
 14 promote the public interest. This section also adopts the
 15 congressional intent behind the federal False Claims Act, 31 U.S.C.
 16 §§3729-3733, including the legislative history underlying the 1986
 17 Amendments to the federal False Claims Act.

18 **ARTICLE 7A. CIVIL ACTIONS ON BEHALF OF THE DEPARTMENT OF WELFARE**

19 **BY PRIVATE CITIZENS,**

20 **§9-7A-1. Definitions.**

21 (a) When used in this article, or in the administration of
 22 this article, terms defined in section two, article seven of this
 23 chapter have the meanings ascribed to them by that section, unless
 24 a different meaning is clearly required by either the context in

1 which the term is used, or by specific definition, in this article.

2 (b) As used in this article, "plaintiff" refers to a private
3 person or other entity who is bringing or has brought a civil
4 action on behalf of the Department of Health and Human Resources
5 under subsection (f), section six, article seven of this chapter.

6 **§9-7A-2. Dismissal of actions; special procedures.**

7 (a) Once filed, a civil action brought by a private person
8 under subsection (f), section six, article seven of this chapter of
9 the code may only be dismissed with written consent of the court,
10 taking into account the best interest of the parties involved and
11 the public purposes behind this article and article seven of this
12 chapter.

13 (b) A plaintiff bringing a civil action under subsection (f),
14 section six, article seven of this chapter shall follow the
15 following special procedures:

16 (1) A copy of the complaint and written disclosure of
17 substantially all material evidence and information the plaintiff
18 possesses shall be served on the Attorney General. The complaint
19 shall be filed in camera, shall remain under seal for at least
20 sixty days, and may not be served on the defendant until the court
21 so orders. The Attorney General may elect to intervene and proceed
22 with the action within sixty days after it receives the complaint,
23 material evidence and information.

24 (2) The Attorney General may, for good cause shown, move the

1 court for extensions of the time during which the complaint remains
2 under seal. The motion or motions may be supported by affidavits
3 or other submissions in camera.

4 (3) When a plaintiff brings a valid action under subsection
5 (f), section six, article seven of this chapter, no person other
6 than the Attorney General may intervene or bring a related civil
7 action based on the facts underlying the pending civil action.

8 Before the expiration of the sixty-day period or any extensions
9 obtained under the preceding subsection, the Attorney General
10 shall:

11 (A) Proceed with the civil action, in which the civil action
12 shall be prosecuted by the Attorney General; or

13 (B) Notify the court that it declines to take over the civil
14 action, in which case the plaintiff has the right to proceed with
15 the civil action.

16 (4)The defendant is not required to respond to any complaint
17 filed under this section until after the complaint is unsealed and
18 served upon the defendant. The defendant is then required to
19 respond in accordance with Rule 12 of the West Virginia Rules of
20 Civil Procedure.

21 (c) If the Attorney General proceeds with the action, then
22 he or she has the primary responsibility for prosecuting the
23 action, and is not bound by an act of the plaintiff. The plaintiff
24 has the right to continue as a party to the action, subject to the

1 following limitations:

2 (1) The Attorney General may seek to dismiss the action for
3 good cause notwithstanding the objections of the plaintiff if the
4 plaintiff has been notified by the Attorney General of the filing
5 of the motion and the court has provided the plaintiff with an
6 opportunity for a hearing on the motion.

7 (2) The Attorney General may settle the action with the
8 defendant notwithstanding the objections of the plaintiff if the
9 court determines, after a hearing providing the plaintiff an
10 opportunity to present evidence, that the proposed settlement is
11 fair, adequate and reasonable under all of the circumstances.

12 (3) Upon a showing by the Attorney General that unrestricted
13 participation during the course of the litigation by the plaintiff
14 would interfere with or unduly delay the Attorney General's
15 prosecution of the case, or would be repetitious, irrelevant or for
16 purposes of harassment, the court may, in its discretion, impose
17 limitations on the plaintiff's participation, such as:

18 (A) Limiting the number of witnesses the plaintiff may call;

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

20 (C) Limiting the plaintiff's cross-examination of witnesses;

21 or

22 (D) Otherwise limiting the participation by the plaintiff in
23 the litigation.

24 (4) Upon a showing by the defendant that unrestricted

1 participation during the course of the litigation by the plaintiff
2 would be for purposes of harassment or would cause the defendant
3 undue burden or unnecessary expense, the court may limit the
4 participation by the plaintiff in the litigation.

5 (d) If the Attorney General elects not to proceed with the
6 action, the plaintiff has the right to continue the action. If the
7 Attorney General so requests, it shall be served with copies of all
8 pleadings filed in the action and shall be supplied with copies of
9 all deposition transcripts at the Attorney General's expense. When
10 a plaintiff proceeds with the action, the court, without limiting
11 the status and rights of the plaintiff, may nevertheless permit the
12 Attorney General to intervene at a later date upon a showing of
13 good cause.

14 (e) Whether or not the Attorney General proceeds with the
15 action, upon a showing by the Attorney General that certain actions
16 of discovery by the plaintiff would interfere with the Attorney
17 General's investigation or prosecution of a criminal or civil
18 matter arising out of the same facts, the court may stay the
19 discovery for a period of not more than sixty days. Such a showing
20 shall be conducted in camera. The court may extend the sixty-day
21 period upon a further showing in camera that the Attorney General
22 has pursued the criminal or civil investigation or proceedings with
23 reasonable diligence and any proposed discovery in the civil action
24 will interfere with the ongoing criminal or civil investigation of

1 proceedings.

2 (f) Notwithstanding subsection (a) of this section, the
3 Attorney General may elect to pursue the claim through any
4 alternate remedy available, including an administrative proceeding
5 to determine a civil money penalty. If an alternate remedy is
6 pursued in another proceeding, the plaintiff has the same rights in
7 that proceeding as the plaintiff would have had if the action had
8 continued under subsection (f), section six, article seven of this
9 chapter. Any finding of fact or conclusion of law made in the
10 other proceeding that has become final is conclusive on all parties
11 to an action under section six, article seven of this chapter. For
12 purposes of the preceding sentence, a finding or conclusion is
13 final if it has been finally determined on appeal to the
14 appropriate court of the state, if all time for filing the appeal
15 with respect to the finding or conclusion has expired, or if the
16 finding or conclusion is not subject to judicial review.

17 **§9-7A-3. Compensation of private citizens bringing actions on**
18 **behalf of the Department of Health and Human Resources;**
19 **state not liable for certain expenses.**

20 (a) Except as provided in subsections (b) and (e) of this
21 section, if the Attorney General proceeds with an action brought by
22 a plaintiff under subsection (f), section six, article seven of
23 this chapter, or the Attorney General pursues an alternate remedy
24 relating to the same acts under subsection (f), section two of this

1 article, the plaintiff shall receive at least fifteen percent, but
2 not more than twenty-five percent of the proceeds of the action or
3 settlement of the claim, depending upon the extent to which the
4 plaintiff contributed to the prosecution of the action or claim.

5 (b) Except as provided in subsection (e) of this section, if
6 an action or claim is one in which the court or other adjudicator
7 finds to be based primarily upon disclosures of specific
8 information not provided by the plaintiff relating to allegations
9 or transactions specifically in a criminal, civil, or
10 administrative hearing, or in a legislative or administrative
11 report, hearing, audit, or investigation, or report made by the
12 news media, the court or other adjudicator may award an amount it
13 considers appropriate, but not more than ten percent of the
14 proceeds of the action or settlement of the claim, depending upon
15 the significance of the information and the role of the plaintiff
16 in advancing the prosecution of the action or claim.

17 (c) Except as provided in subsection (e) of this section, in
18 addition to any amount received under subsection (a) or (b) of this
19 section, a plaintiff shall be awarded his or her reasonable
20 expenses necessarily incurred in bringing the action together with
21 the person's costs and reasonable actual attorney fees. The court
22 or other adjudicator shall assess any award under this program
23 against the defendant.

24 (d) Except as provided in subsection (e) of this section, if

1 the Attorney General does not proceed with an action or an
2 alternate proceeding under subsection (f), section two of this
3 article, the plaintiff shall receive an amount that the court
4 decides is reasonable for collection of the civil penalty and
5 damages. The amount may not be less than twenty-five percent, but
6 not more than thirty percent of the proceeds of the action and
7 shall be paid from the proceeds. In addition the person shall be
8 paid his or her expenses, costs and fees under subsection (c) of
9 this section.

10 (e) Whether or not Attorney General proceeds with the action
11 or an alternate proceeding under subsection (f), section two of
12 this article, if the court or other adjudicator finds that an
13 action was brought by a plaintiff who planned or initiated a
14 violation upon which the action or proceeding is based, then the
15 court may, to the extent that the court considers appropriate,
16 reduce the share of the proceeds of the action that the person
17 would otherwise receive under subsection (a), (b) or (d) of this
18 section, taking into account the role of the plaintiff in advancing
19 the prosecution of the action or claim and any other relevant
20 circumstance pertaining to the violation, except that if the
21 plaintiff is convicted of criminal conduct arising from his or her
22 role in a violation specified in article seven of this chapter, the
23 court or other adjudicator shall dismiss the person as a party and
24 the person may not receive any share of the proceeds of the action

1 or claim or any expenses, costs and fees under subsection (c) of
2 this section.

3 (f) The state is not liable for any expenses incurred by a
4 private person in bringing an action under subsection (f), section
5 six, article seven of this chapter.

6 **§9-7A-4. Certain actions barred.**

7 (a) Courts do not have jurisdiction over an action brought by
8 a plaintiff under subsection (f), section six, article seven of
9 this chapter against a state public official if the action is based
10 upon information known to the Attorney General at the time that the
11 action is brought.

12 (b) Persons may not bring an action under subsection (f),
13 section six, article seven of this chapter that is based upon
14 allegations or transactions that are the subject of a civil action
15 or an administrative proceeding to assess a civil forfeiture in
16 which the state is a party if that action or proceeding was
17 commenced prior to the date that the action is filed.

18 **§9-7A-5. Private action for retaliation.**

19 Any employee who is discharged, demoted, suspended,
20 threatened, harassed or in any other manner discriminated against
21 in the terms and conditions of employment by his or her employer
22 because of lawful acts done by the employee on behalf of the
23 employee or others in furtherance of an action under this
24 subsection (f), section six, article seven of this chapter,

1 including investigation for, initiation of, testimony for, or
2 assistance in an action filed or to be filed under that subsection,
3 is entitled to all relief necessary to make the employee whole.
4 The relief shall include reinstatement with the same seniority
5 status the employee would have had but for the discrimination, two
6 times the amount of back pay, interest on the back pay, and
7 compensation for any special damages sustained as a result of the
8 discrimination, including litigation costs and reasonable
9 attorneys' fees. An employee may bring an action in the
10 appropriate court of this state for the relief provided in this
11 subsection.

12 **§9-7A-6. Limitation of actions; retroactivity; burden of proof.**

13 (a) A civil action under subsection (f), section six, article
14 seven of this chapter may not be brought more than ten years after
15 the date on which the violation was committed. A civil action
16 under that subsection may be brought for activity that occurred
17 before the effective date of this article if the limitations period
18 has not lapsed.

19 (b) In any action brought under subsection (f), section six,
20 article seven of this chapter, the Attorney General or the
21 plaintiff is required to prove all essential elements of the cause
22 of action, including damages, by a preponderance of the evidence.

23 **§9-7A-7. Liberality of legislative construction and adoption of**
24 **legislative history.**

1 This article shall be liberally construed and applied to
2 promote the public interest. This article adopts the congressional
3 intent behind the federal False Claims Act, 31 U.S.C. §§3729-3733,
4 including the legislative history underlying the 1986 Amendments to
5 the federal False Claims Act.

NOTE: The purpose of this bill is to modify existing law concerning civil remedies for false claims against the medical programs of the Department of Health and Human Resources, and to adopt the congressional intent behind the federal False Claims Act, 31 U.S.C. §§3729-3733.

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

§9-7A is new; therefore, it has been completely underscored.