

H. B. 4001

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

[Introduced January 8, 2014; referred to the
Committee on the Judiciary.]

A BILL to amend the code of West Virginia, 1931, as 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, §14-4-9, §14-4-10 and §14-4-11, all relating to creating 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:

1 That said Code be amended by adding thereto a new article,
2 designated §14-4-1, §14-4-2, §14-4-3, §14-4-4, §14-4-5, §14-4-6,
3 §14-4-7, §14-4-8, §14-4-9, §14-4-10 and §14-4-11, all to read as
4 follows:

5 **ARTICLE 4. FALSE CLAIMS ACT.**

6 **§14-4-1. Definitions.**

7 For purposes of this article:

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

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

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

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

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

22 (C) "Claim" does not include a request or demand for money or
23 property that the state has paid to an individual as compensation
24 for state employment or as an income subsidy with no restrictions

1 on that individual's use of the money or property.

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

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

8 (A) Has actual knowledge of the information;

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

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

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

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

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

23 (6) "Person" means any natural person, partnership,
24 corporation, organization, association, business, trust or other

1 legal entity, including any political subdivision of the state.

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

4 (a) Any person who commits any of the following acts is liable
5 to the state for three times the amount of damages which the state
6 sustains because of the act of that person. A person who commits
7 any of the following acts is also liable to the state for the
8 costs, including attorneys' fees, of a civil action brought to
9 recover any of those penalties or damages, and may be liable to the
10 state for a civil penalty of not less than \$5,500 and not more than
11 \$11,000, as adjusted by the Federal Civil Penalties Inflation
12 Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410),
13 for each violation:

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

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

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

21 (4) Is authorized to make or deliver a document certifying
22 receipt of property used, or to be used, by the state and,
23 intending to defraud the state, makes or delivers the receipt
24 without completely knowing that the information on the receipt is

1 true;

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

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

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

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

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

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

23 (1) The person committing the violation provided officials of
24 the state who are responsible for investigating false claims

1 violations with all information known to that person about the
2 violation within thirty days after the date on which the person
3 first obtained the information;

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

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

11 **§14-4-3. Attorney General investigations and prosecutions; powers**
12 **of prosecuting authority; civil actions by individuals**
13 **as qui tam plaintiff and as private citizens;**
14 **jurisdiction of courts.**

15 The Attorney General diligently shall investigate a violation
16 under subsection (a) of section two of this article. If the
17 Attorney General finds that a person has violated or is violating
18 subsection (a) of section two, the Attorney General may bring a
19 civil action under this section against that person.

20 **§14-4-4. Actions by private persons.**

21 (a) A person may bring a civil action for a violation of this
22 article for the person and for the state in the name of the state.
23 The person bringing the action shall be referred to as the qui tam

1 plaintiff. Once filed, the action may be dismissed only with the
2 written consent of the court and the Attorney General, taking into
3 account the best interest of the parties involved and the public
4 purposes behind this article.

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

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

24 (d) Before the expiration of the sixty-day period or any

1 extensions obtained under subsection (c), the state shall:

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

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

8 (e) When a person brings a valid action under this section, no
9 person other than the state may intervene or bring a related action
10 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
13 responsibility for prosecuting the action, and may not be bound by
14 an act of the person bringing the action. That person may continue
15 as a party to the action, subject to the limitations set forth in
16 subsection (b).

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

23 (A) Upon a hearing on the state's motion to dismiss the
24 action, the Court shall consider, and is authorized to grant, a

1 proposal by the *qui tam* plaintiff to proceed with the action
2 without the Attorney General's participation.

3 (B) Any award resulting from an action authorized by the Court
4 pursuant to paragraph (A) of this subdivision shall be made
5 pursuant to section six of this article.

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

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

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

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

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

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

22 (4) Upon a showing by the defendant that unrestricted
23 participation during the course of the litigation by the person
24 initiating the action would be for purposes of harassment or would

1 cause the defendant undue burden or unnecessary expense, the court
2 may limit the participation by the person in the litigation.

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

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

23 (e) Notwithstanding section four of this article, the state
24 may elect to pursue its claim through any alternate remedy

1 available to the state, including any administrative proceeding to
2 determine a civil money penalty. If any alternate remedy is pursued
3 in another proceeding, the person initiating the action has the
4 same rights in that proceeding as the person would have had if the
5 action had continued under section four of this article. Any
6 finding of fact or conclusion of law made in such other proceeding
7 that has become final shall be conclusive on all parties to an
8 action under section four of this article. A finding or conclusion
9 is final if it has been finally determined on appeal to the
10 appropriate court of the state, if all time for filing an appeal
11 with respect to the finding or conclusion has expired or if the
12 finding or conclusion is not subject to judicial review.

13 **§14-4-6. Award to qui tam plaintiff.**

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

21 (2) Where the action is one which the court finds to be based
22 primarily on disclosures of specific information (other than
23 information provided by the person bringing the action) relating to
24 allegations or transactions specifically in a criminal, civil or

1 administrative hearing, in a legislative or administrative report,
2 hearing, audit or investigation, or from the news media, the court
3 may award such sums as it considers appropriate, but in no case
4 more than ten percent of the proceeds, taking into account the
5 significance of the information and the role of the person bringing
6 the action in advancing the case to litigation.

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

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

23 (c) Whether or not the state proceeds with the action, if the
24 court finds that the action was brought by a person who planned and

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

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

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

22 **§14-4-7. Certain actions barred.**

23 (a) A court does not have jurisdiction over an action brought
24 under section four of this article against a member of the state

1 legislative branch, a member of the judiciary or a senior executive
2 branch official if the action is based on evidence or information
3 known to the state when the action was brought.

4 (b) A person may not bring an action under section four of
5 this article which is based upon allegations or transactions which
6 are the subject of a civil suit or an administrative civil money
7 penalty proceeding in which the state is already a party.

8 (c) (1) The court shall dismiss an action or claim under this
9 section, unless opposed by the state, if substantially the same
10 allegations or transactions as alleged in the action or claim were
11 publicly disclosed:

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

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

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

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

21 (A) Prior to a public disclosure under subsection (c), has
22 voluntarily disclosed to the state or federal government the
23 information on which allegations or transactions in a claim are
24 based, or

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

5 **§14-4-8. State not liable for certain expenses.**

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

8 **§14-4-9. Private action for retaliatory actions.**

9 (a) Any employee, contractor or agent who is discharged,
10 demoted, suspended, threatened, harassed or in any other manner
11 discriminated against in the terms and conditions of employment by
12 the employer of the employee, contractor or agent because of lawful
13 acts done by the employee, contractor, agent or associated others
14 in furtherance of an action brought or to be brought under sections
15 three or four of this article, or other efforts to stop one or more
16 violations of this article, including investigation for, initiation
17 of, testimony for, or assistance in the action, is entitled to all
18 relief necessary to make the employee, contractor or agent whole.
19 The relief shall include reinstatement with the same seniority
20 status the employee, contractor or agent would have had but for the
21 discrimination, two times the amount of back pay, interest on the
22 back pay and compensation for any special damages sustained as a
23 result of the discrimination, including litigation costs and
24 reasonable attorney's fees.

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

6 **§14-4-10. Limitation of actions; activities antedating this**
7 **article; burden of proof.**

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

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

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

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

22 (c) If the state elects to intervene and proceed with an
23 action brought under section four of this article, the state may
24 file its own complaint or amend the complaint of a person who has

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

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

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

1 **§14-4-11. Remedies under other laws; liberality of construction.**

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

6 (b) This article shall be liberally construed and applied to
7 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). It states prohibited acts, damages, costs and civil penalties. The bill places limitations on damages and sets out the responsibilities of the Attorney General. It 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. It provides for retroactive application and state intervention in action by private person. It provides for estoppel of defenses in certain situations. It states jurisdiction and venue, provides for nonexclusivity of action and provides for liberality of construction.

This article is new; therefore, it has been completely underscored.