

COMMITTEE SUBSTITUTE

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Senate Bill No. 101

(By Senators McCabe, Cann, Miller, Jenkins and Barnes)

[Originating in the Committee on the Judiciary;
reported March 1, 2013.]

A BILL to amend and reenact §16-5C-15 of the Code of West Virginia, 1931, as amended, relating to clarifying that the Medical Professional Liability Act applies to nursing homes and their health care providers.

Be it enacted by the Legislature of West Virginia:

That §16-5C-15 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 5C. NURSING HOMES.

§16-5C-15. Unlawful acts; penalties; injunctions; private right of action.

1 (a) Whoever advertises, announces, establishes or
2 maintains, or is engaged in establishing or maintaining a
3 nursing home without a license granted under section six of
4 this article, or who prevents, interferes with or impedes in
5 any way the lawful enforcement of this article ~~shall be~~ is
6 guilty of a misdemeanor and, upon conviction thereof, shall
7 be punished for the first offense by a fine of not more than
8 \$100, or by ~~imprisonment~~ confinement in ~~the county or~~
9 ~~regional~~ jail for a period of not more than ninety days, or by
10 both ~~such~~ fine and ~~imprisonment~~ confinement, at the
11 discretion of the court. For each subsequent offense, the fine
12 may be increased to not more than \$250, with ~~imprisonment~~
13 confinement in ~~the county or regional~~ jail for a period of not
14 more than ninety days, or by both ~~such~~ fine and
15 ~~imprisonment~~ confinement, at the discretion of the court.
16 Each day of a continuing violation after conviction ~~shall be~~
17 is considered a separate offense.

18 (b) The director may in his or her discretion bring an
19 action to enforce compliance with this article or any rule or

20 order hereunder whenever it ~~shall appear~~ appears to the
21 director that any person has engaged in, or is engaging in, an
22 act or practice in violation of this article or any rule or order
23 hereunder, or whenever it ~~shall appear~~ appears to the director
24 that any person has aided, abetted or caused, or is aiding,
25 abetting or causing, such an act or practice. Upon application
26 by the director, the circuit court of the county in which the
27 conduct has occurred or is occurring, or if emergency
28 circumstances occur the circuit court of Kanawha County,
29 ~~shall have~~ has jurisdiction to grant without bond a permanent
30 or temporary injunction, decree or restraining order.

31 Whenever the director ~~shall have~~ has refused to grant or
32 renew a license, or ~~shall have~~ has revoked a license required
33 by law to operate or conduct a nursing home, or ~~shall have~~
34 has ordered a person to refrain from conduct violating the
35 rules of the director, and the person ~~deeming himself or~~
36 ~~herself aggrieved by such refusal or revocation or order shall~~
37 ~~have~~ has appealed the action of the director, the court may,
38 during pendency of ~~such~~ the appeal, issue a restraining order

39 or injunction upon proof that the operation of the nursing
40 home or its failure to comply with the order of the director
41 adversely affects the well being or safety of the residents of
42 the nursing home. Should a person who is refused a license
43 or the renewal of a license to operate or conduct a nursing
44 home or whose license to operate is revoked or who has been
45 ordered to refrain from conduct or activity which violates the
46 rules of the director fails to appeal or should ~~such~~ the appeal
47 be decided favorably to the director, then the court shall issue
48 a permanent injunction upon proof that the person is
49 operating or conducting a nursing home without a license as
50 required by law, or has continued to violate the rules of the
51 director.

52 (c) Any nursing home that deprives a resident of any right
53 or benefit created or established for the well being of this
54 resident by the terms of any contract, by any state statute or
55 rule, or by any applicable federal statute or regulation, shall
56 be liable to the resident for injuries suffered as a result of
57 such deprivation. Upon a finding that a resident has been

58 deprived of such a right or benefit, and that the resident has
59 been injured as a result of such deprivation, and unless there
60 is a finding that the nursing home exercised all care
61 reasonably necessary to prevent and limit the deprivation and
62 injury to the resident, compensatory damages shall be
63 assessed in an amount sufficient to compensate the resident
64 for such injury. In addition, where the deprivation of ~~any~~
65 ~~such~~ the right or benefit is found to have been willful or in
66 reckless disregard of the lawful rights of the resident,
67 punitive damages may be assessed. A resident may also
68 maintain an action pursuant to this section for any other type
69 of relief, including injunctive and declaratory relief,
70 permitted by law. Exhaustion of any available administrative
71 remedies ~~may~~ is not ~~be~~ required prior to commencement of
72 suit ~~hereunder~~ under this subsection.

73 (d) The amount of damages recovered by a resident, in an
74 action brought pursuant to this section, ~~shall be~~ is exempt for
75 purposes of determining initial or continuing eligibility for
76 medical assistance under article four, chapter nine of this

77 code, and may neither be taken into consideration nor
78 required to be applied toward the payment or part payment of
79 the cost of medical care or services available under ~~said~~ that
80 article.

81 (e) Any waiver by a resident or his or her legal
82 representative of the right to commence an action under this
83 section, whether oral or in writing, ~~shall be null and is~~ is void
84 as contrary to public policy.

85 ~~(d)~~ (f) The penalties and remedies provided in this section
86 are cumulative and ~~shall be~~ are in addition to all other
87 penalties and remedies provided by law.

88 (g) Nothing in this section or any other section of the
89 code shall limit the protections afforded nursing homes or
90 their health care providers under article seven-b, chapter
91 fifty-five of this code. Nursing homes and their health care
92 providers shall be treated in the same manner as any other
93 health care facility or health care provider under article
94 seven-b, chapter fifty-five of this code. The terms “health
95 care facility” and “health care provider” as used in this

96 subsection shall have the same meaning as set forth in
97 subsections (f) and (g), section two, article seven-b, chapter
98 fifty-five of this code.

99 (h) The amendments to this section enacted during the
100 2013 Regular Session of the Legislature shall be effective
101 July 1, 2013: *Provided*, That there shall be no inference,
102 either positive or negative, to any legal action pending
103 pursuant to this section as of the first of July, 2013. The
104 proper construction of this section and the limitations and
105 provisions of article seven-b, chapter fifty-five of this code
106 shall be determined by principles of statutory construction.

(NOTE: The purpose of this bill is to provide technical clean-up and to clarify that the Legislature originally intended that the Medical Professional Liability Act applies to nursing homes and their health care providers.

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

This bill has been recommended for passage during the 2013 Regular Session by the Select Committee on PEIA, Seniors and Long Term Care.)