

1 COMMITTEE SUBSTITUTE

2 FOR

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4 FOR

5 **Senate Bill No. 101**

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

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8 [Originating in the Committee on the Judiciary;  
9 reported March 1, 2013.]  
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12 A BILL to amend and reenact §16-5C-15 of the Code of West Virginia,  
13 1931, as amended, relating to clarifying that the Medical  
14 Professional Liability Act applies to nursing homes and their  
15 health care providers.

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

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

19 **ARTICLE 5C. NURSING HOMES.**

20 **§16-5C-15. Unlawful acts; penalties; injunctions; private right**  
21 **of action.**

22 (a) Whoever advertises, announces, establishes or maintains,  
23 or is engaged in establishing or maintaining a nursing home without  
24 a license granted under section six of this article, or who  
25 prevents, interferes with or impedes in any way the lawful

1 enforcement of this article ~~shall be~~ is guilty of a misdemeanor  
2 and, upon conviction thereof, shall be punished for the first  
3 offense by a fine of not more than \$100, or by ~~imprisonment~~  
4 confinement in ~~the county or regional~~ jail for a period of not more  
5 than ninety days, or by both ~~such~~ fine and ~~imprisonment~~  
6 confinement, at the discretion of the court. For each subsequent  
7 offense, the fine may be increased to not more than \$250, with  
8 ~~imprisonment~~ confinement in ~~the county or regional~~ jail for a  
9 period of not more than ninety days, or by both ~~such~~ fine and  
10 ~~imprisonment~~ confinement, at the discretion of the court. Each day  
11 of a continuing violation after conviction ~~shall be~~ is considered  
12 a separate offense.

13 (b) The director may in his or her discretion bring an action  
14 to enforce compliance with this article or any rule or order  
15 hereunder whenever it ~~shall appear~~ appears to the director that any  
16 person has engaged in, or is engaging in, an act or practice in  
17 violation of this article or any rule or order hereunder, or  
18 whenever it ~~shall appear~~ appears to the director that any person  
19 has aided, abetted or caused, or is aiding, abetting or causing,  
20 such an act or practice. Upon application by the director, the  
21 circuit court of the county in which the conduct has occurred or is  
22 occurring, or if emergency circumstances occur the circuit court of  
23 Kanawha County, ~~shall have~~ has jurisdiction to grant without bond  
24 a permanent or temporary injunction, decree or restraining order.

25 Whenever the director ~~shall have~~ has refused to grant or renew  
26 a license, or ~~shall have~~ has revoked a license required by law to

1 operate or conduct a nursing home, or ~~shall have~~ has ordered a  
2 person to refrain from conduct violating the rules of the director,  
3 and the person ~~deeming himself or herself aggrieved by such refusal~~  
4 ~~or revocation or order shall have~~ has appealed the action of the  
5 director, the court may, during pendency of ~~such~~ the appeal, issue  
6 a restraining order or injunction upon proof that the operation of  
7 the nursing home or its failure to comply with the order of the  
8 director adversely affects the well being or safety of the  
9 residents of the nursing home. Should a person who is refused a  
10 license or the renewal of a license to operate or conduct a nursing  
11 home or whose license to operate is revoked or who has been ordered  
12 to refrain from conduct or activity which violates the rules of the  
13 director fails to appeal or should ~~such~~ the appeal be decided  
14 favorably to the director, then the court shall issue a permanent  
15 injunction upon proof that the person is operating or conducting a  
16 nursing home without a license as required by law, or has continued  
17 to violate the rules of the director.

18 (c) Any nursing home that deprives a resident of any right or  
19 benefit created or established for the well-being of this resident  
20 by the terms of any contract, by any state statute or rule, or by  
21 any applicable federal statute or regulation, shall be liable to  
22 the resident for injuries suffered as a result of such deprivation.  
23 Upon a finding that a resident has been deprived of such a right or  
24 benefit, and that the resident has been injured as a result of such  
25 deprivation, and unless there is a finding that the nursing home  
26 exercised all care reasonably necessary to prevent and limit the

1 deprivation and injury to the resident, compensatory damages shall  
2 be assessed in an amount sufficient to compensate the resident for  
3 such injury. In addition, where the deprivation of ~~any such~~ the  
4 right or benefit is found to have been willful or in reckless  
5 disregard of the lawful rights of the resident, punitive damages  
6 may be assessed. A resident may also maintain an action pursuant  
7 to this section for any other type of relief, including injunctive  
8 and declaratory relief, permitted by law. Exhaustion of any  
9 available administrative remedies ~~may~~ is not ~~be~~ required prior to  
10 commencement of suit ~~hereunder~~ under this subsection.

11 (d) The amount of damages recovered by a resident, in an  
12 action brought pursuant to this section, ~~shall be~~ is exempt for  
13 purposes of determining initial or continuing eligibility for  
14 medical assistance under article four, chapter nine of this code,  
15 and may neither be taken into consideration nor required to be  
16 applied toward the payment or part payment of the cost of medical  
17 care or services available under ~~said~~ that article.

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

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

25 (g) Nothing in this section or any other section of the code  
26 shall limit the protections afforded nursing homes or their health

1 care providers under article seven-b, chapter fifty-five of this  
2 code. Nursing homes and their health care providers shall be  
3 treated in the same manner as any other health care facility or  
4 health care provider under article seven-b, chapter fifty-five of  
5 this code. The terms "health care facility" and "health care  
6 provider" as used in this subsection shall have the same meaning as  
7 set forth in subsections (f) and (g), section two, article seven-b,  
8 chapter fifty-five of this code.

9 (h) The amendments to this section enacted during the 2013  
10 Regular Session of the Legislature shall be effective July 1, 2013:  
11 Provided, That there shall be no inference, either positive or  
12 negative, to any legal action pending pursuant to this section as  
13 of July 1, 2013. The proper construction of this section and the  
14 limitations and provisions of article seven-b, chapter fifty-five  
15 of this code shall be determined by principles of statutory  
16 construction.

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(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.)