



MEMORANDUM

TO: Members of the Assembly Health and Senior Services Committee
FROM: Marcus Rayner, President
SUBJECT: NJCJI Opposition to Assembly Bill 4041
DATE: February 5, 2015

The New Jersey Civil Justice Institute is a statewide, bipartisan coalition of the state's largest employers, small businesses, and leading trade associations advocating for a fair and predictable civil justice system in New Jersey. On behalf of our members, **we respectfully oppose A-4041.**

This bill is very narrowly drafted. Specifically, it would retroactively address claims based on violations filed before March 13, 2008, brought within the relevant statute of limitations, and submitted to the Attorney General prior to October 11, 2011. It would permit those claims to be amended to assert additional allegations related to the filed claims for up to six years prior to March 13, 2008.

In fact, the retroactive exception to the statute of limitations is drafted to apply to one person. To the extent the legislation is successful, it is a legislatively effected benefit to one individual, which is not a legitimate legislative purpose. To the extent the legislation is not drafted narrowly enough, it could potentially put other health care related businesses at risk of retroactive liability.

It is "a fundamental rule of jurisprudence that the retroactive application of new laws involves a high risk of being unfair."¹ The False Claims Act is an especially bad candidate for retroactive application. This law was passed over the strong objections of the state's business community, including the pharmaceutical industry, because its treble damages and *qui tam* actions make it a powerful and punitive piece of legislation that is easily abused. The U.S. Supreme Court itself has noted the powerful monetary incentives inherent in the law.² To now expand the scope of the False Claims Act to cover conduct that took place before the law was enacted would take this powerful and controversial law in the wrong direction.

¹ Hayling v Correctional Medical Services, Inc. (NJ Superior Ct. App. Div., Oct. 11, 2011)

² [Hughes Aircraft Co. v. United States ex rel. Schumer](#), (520 US 939, 1997)

Further, this legislation represents an attempt to use the legislative process to single out and penalize a particular party, for the benefit of another individual, retroactively. As such, its public policy merits are questionable.

Moreover, this legislation would create a dangerous precedent. Businesses need predictability in the law. Opening the door to the retroactive legislative expansion of liability inescapably sets a precedent for future exceptions. No matter the assurances that this is a one-time event, the fact of this retroactive application would necessarily become a part of the landscape that makes predicting future liability significantly more difficult for New Jersey businesses.

Perhaps most significantly, a retroactive expansion of liability under the False claims act is likely unconstitutional. The New Jersey appellate decision that triggered this legislative effort did not reach the question of whether a retroactive application of the law would be constitutional. But federal courts have, when applying the federal counterpart to the New Jersey False Claims Act. Two federal district courts have already held that the retroactive application of the False Claims Act via legislative amendment is unconstitutional. Finding that the treble damages render the statutory scheme punitive in purpose and effect, both courts held that applying the act retroactively would violate the Ex Post Facto clause of the U.S. Constitution.³

Thank you for your consideration.

The New Jersey Civil Justice Institute respectfully requests that you vote no on A-4041.

³ United States ex rel. Sanders v. Allison Engine Co., Inc., 667 F. Supp. 2d 747 (S.D. Ohio 2009); United States ex rel. Baker v. Community Health Sys., Inc., 709 F. Supp. 2d 1084 (D.N.M. 2010).