WEST VIRGINIA CODE: §29-12-5

§29-12-5. Powers and duties of board.

(a)(1) The board has, without limitation and in its discretion as it seems necessary for the benefit of the insurance program, general supervision and control over the insurance of state property, activities and responsibilities, including:

(A) The acquisition and cancellation of state insurance;

(B) Determination of the kind or kinds of coverage;

(C) Determination of the amount or limits for each kind of coverage;

(D) Determination of the conditions, limitations, exclusions, endorsements, amendments and deductible forms of insurance coverage;

(E) Inspections or examinations relating to insurance coverage of state property, activities and responsibilities;

(F) Reinsurance; and

(G) Any and all matters, factors and considerations entering into negotiations for advantageous rates on and coverage of such state property, activities and responsibilities.

(2) The board shall endeavor to secure reasonably broad protection against loss, damage or liability to state property and on account of state activities and responsibilities by proper, adequate, available and affordable insurance coverage and through the introduction and employment of sound and accepted principles of insurance, methods of protection and principles of loss control and risk.

(3) The board is not required to provide insurance for every state property, activity or responsibility.

(4) Any policy of insurance purchased or contracted for by the board shall provide that the insurer shall be barred and estopped from relying upon the Constitutional immunity of the State of West Virginia against claims or suits: *Provided*, That nothing herein shall bar a state agency or state instrumentality from relying on the Constitutional immunity granted the State of West Virginia against claims or suits arising from or out of any state property, activity or responsibility not covered by a policy or policies of insurance: *Provided, however*, That nothing herein shall bar the insurer of political subdivisions from relying upon any statutory immunity granted such political subdivisions against claims or suits.

(5) The board shall make a complete survey of all presently owned and subsequently acquired state property subject to insurance coverage by any form of insurance, which

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survey shall include and reflect inspections, appraisals, exposures, fire hazards, construction and any other objectives or factors affecting or which might affect the insurance protection and coverage required.

(6) The board shall keep itself currently informed on new and continuing state activities and responsibilities within the insurance coverage herein contemplated. The board shall work closely in cooperation with the state Fire Marshal's office in applying the rules of that office insofar as the appropriations and other factors peculiar to state property will permit.

(7) The board may negotiate and effect settlement of any and all insurance claims arising on or incident to losses of and damages to covered state properties, activities and responsibilities hereunder and shall have authority to execute and deliver proper releases of all such claims when settled. The board may adopt rules and procedures for handling, negotiating and settlement of all such claims. Any discussion or consideration of the financial or personal information of an insured may be held by the board in executive session closed to the public, notwithstanding the provisions of article nine-a, chapter six of this code.

(8) The board may employ an executive director and such other employees, including legal counsel, as may be necessary to carry out its duties. The executive director shall receive an annual salary as provided in section two-a, article seven, chapter six of this code. The legal counsel may represent the board before any judicial or administrative tribunal and perform such other duties as may be requested by the board.

(9) The board may enter into any contracts necessary to the execution of the powers granted to it by this article or to further the intent of this article.

(10) The board may make rules governing its functions and operations and the procurement of state insurance. Except where otherwise provided by statute, rules of the board are subject to the provisions of article three, chapter twenty-nine-a of this code.

(11) The funds received by the board, including, but not limited to, state agency premiums, mine subsidence premiums and political subdivision premiums, shall be deposited with the West Virginia Investment Management Board with the interest income and returns on investment a proper credit to such property insurance trust fund or liability insurance trust fund as applicable.

(b) (1) Definitions. — The following words and phrases when used in this subsection, for the purposes of this subsection, have the meanings respectively ascribed to them in this subsection;

(A) "Political subdivision" has the same meaning as in section three, article twelve-a of this chapter;

(B) "Charitable" or "public service organization" means any hospital in this state which has been certified as a critical access hospital by the federal Centers for Medicare and Medicaid

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upon the designation of the state Office of Rural Health Policy, the Office of Community and Rural Health Services, the Bureau for Public Health or the Department of Health and any bona fide, not-for-profit, tax-exempt, benevolent, educational, philanthropic, humane, patriotic, civic, religious, eleemosynary, incorporated or unincorporated association or organization or a rescue unit or other similar volunteer community service organization or association, but does not include any nonprofit association or organization, whether incorporated or not, which is organized primarily for the purposes of influencing legislation or supporting or promoting the campaign of any candidate for public office; and

(C) "Emergency medical service agency" has the same meaning as in §16-4C-3 of this code.

(2) If requested by a political subdivision, a charitable or public service organization or an emergency medical services agency, the board may, but is not required to, provide property and liability insurance to insure the property, activities and responsibilities of the political subdivision, charitable or public service organization or emergency medical services agency. The board may enter into any contract necessary to the execution of the powers granted by this article or to further the intent of this article.

(A) Property insurance provided by the board pursuant to this subsection may also include insurance on property leased to or loaned to the political subdivision, a charitable or public service organization or an emergency medical services agency which is required to be insured under a written agreement.

(B) The cost of insurance, as determined by the board, shall be paid by the political subdivision, the charitable or public service organization or the emergency medical services agency and may include administrative expenses. For purposes of this section, if an emergency medical services agency is a for-profit entity, its claims history may not adversely affect other participants' rates in the same class.

(c)(1) The board has general supervision and control over the optional medical liability insurance programs providing coverage to health care providers as authorized by the provisions of article twelve-b of this chapter. The board is hereby granted and may exercise all powers necessary or appropriate to carry out and effectuate the purposes of this article.

(2) The board shall:

(A) Administer the preferred medical liability program and the high risk medical liability program and exercise and perform other powers, duties and functions specified in this article;

(B) Obtain and implement, at least annually, from an independent outside source, such as a medical liability actuary or a rating organization experienced with the medical liability line of insurance, written rating plans for the preferred medical liability program and high-risk medical liability program on which premiums shall be based;

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(C) Prepare and annually review written underwriting criteria for the preferred medical liability program and the high-risk medical liability program. The board may utilize review panels, including, but not limited to, the same specialty review panels to assist in establishing criteria;

(D) Prepare and publish, before each regular session of the Legislature, separate summaries for the preferred medical liability program and high-risk medical liability program activity during the preceding fiscal year, each summary to be included in the board of Risk and Insurance Management audited financial statements as "other financial information" and which shall include a balance sheet, income statement and cash flow statement, an actuarial opinion addressing adequacy of reserves, the highest and lowest premiums assessed, the number of claims filed with the program by provider type, the number of judgments and amounts paid from the program, the number of settlements and amounts paid from the program and the number of dismissals without payment;

(E) Determine and annually review the claims history debit or surcharge for the high-risk medical liability program;

(F) Determine and annually review the criteria for transfer from the preferred medical liability program to the high-risk medical liability program;

(G) Determine and annually review the role of independent agents, the amount of commission, if any, to be paid therefor and agent appointment criteria;

(H) Study and annually evaluate the operation of the preferred medical liability program and the high-risk medical liability program and make recommendations to the Legislature, as may be appropriate, to ensure their viability, including, but not limited to, recommendations for civil justice reform with an associated cost-benefit analysis, recommendations on the feasibility and desirability of a plan which would require all health care providers in the state to participate with an associated cost-benefit analysis, recommendations on additional funding of other state-run insurance plans with an associated cost-benefit analysis and recommendations on the desirability of ceasing to offer a state plan with an associated analysis of a potential transfer to the private sector with a cost-benefit analysis, including impact on premiums;

(I) Establish a five-year financial plan to ensure an adequate premium base to cover the long-tail nature of the claims-made coverage provided by the preferred medical liability program and the high-risk medical liability program. The plan shall be designed to meet the program's estimated total financial requirements, taking into account all revenues projected to be made available to the program and apportioning necessary costs equitably among participating classes of health care providers. For these purposes, the board shall:

(i) Retain the services of an impartial, professional actuary, with demonstrated experience in analysis of large group malpractice plans, to estimate the total financial requirements of the program for each fiscal year and to review and render written professional opinions as to

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financial plans proposed by the board. The actuary shall also assist in the development of alternative financing options and perform any other services requested by the board or the executive director. All reasonable fees and expenses for actuarial services shall be paid by the board. Any financial plan or modifications to a financial plan approved or proposed by the board pursuant to this section shall be submitted to and reviewed by the actuary and may not be finally approved and submitted to the Governor and to the Legislature without the actuary's written professional opinion that the plan may be reasonably expected to generate sufficient revenues to meet all estimated program and administrative costs, including incurred but not reported claims, for the fiscal year for which the plan is proposed. The actuary's opinion for any fiscal year shall include a requirement for establishment of a reserve fund;

(ii) Submit its final, approved five-year financial plan, after obtaining the necessary actuary's opinion, to the Governor and to the Legislature no later than January 1, preceding the fiscal year. The financial plan for a fiscal year becomes effective and shall be implemented by the executive director on July 1, of the fiscal year. In addition to each final, approved financial plan required under this section, the board shall also simultaneously submit an audited financial statement based on generally accepted accounting practices (GAAP) and which shall include allowances for incurred but not reported claims: *Provided*, That the financial statement and the accrual-based financial plan restatement shall not affect the approved financial plan. The provisions of chapter twenty-nine-a of this code shall not apply to the preparation, approval and implementation of the financial plans required by this section;

(iii) Submit to the Governor and the Legislature a prospective five-year financial plan beginning on January 1, 2003, and every year thereafter, for the programs established by the provisions of article twelve-b of this chapter. Factors that the board shall consider include, but shall not be limited to, the trends for the program and the industry; claims history, number and category of participants in each program; settlements and claims payments; and judicial results;

(iv) Obtain annually certification from participants that they have made a diligent search for comparable coverage in the voluntary insurance market and have been unable to obtain the same;

(J) Meet on at least a quarterly basis to review implementation of its current financial plan in light of the actual experience of the medical liability programs established in article twelve-b of this chapter. The board shall review actual costs incurred, any revised cost estimates provided by the actuary, expenditures and any other factors affecting the fiscal stability of the plan and may make any additional modifications to the plan necessary to ensure that the total financial requirements of these programs for the current fiscal year are met;

(K) To analyze the benefit of and necessity for excess verdict liability coverage;

(L) Consider purchasing reinsurance, in the amounts as it may, from time to time, determine is appropriate, and the cost thereof shall be considered to be an operating expense of the

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board;

(M) Make available to participants optional extended reporting coverage or tail coverage: *Provided*, That, at least five working days prior to offering such coverage to a participant or participants, the board shall notify the President of the Senate and the Speaker of the House of Delegates in writing of its intention to do so and such notice shall include the terms and conditions of the coverage proposed;

(N) Review and approve, reject or modify rules that are proposed by the executive director to implement, clarify or explain administration of the preferred medical liability program and the high-risk medical liability program. Notwithstanding any provisions in this code to the contrary, rules promulgated pursuant to this paragraph are not subject to the provisions of sections nine through sixteen, inclusive, article three, chapter twenty-nine-a of this code. The board shall comply with the remaining provisions of article three and shall hold hearings or receive public comments before promulgating any proposed rule filed with the Secretary of State: *Provided*, That the initial rules proposed by the executive director and promulgated by the board shall become effective upon approval by the board notwithstanding any provision of this code;

(O) Enter into settlements and structured settlement agreements whenever appropriate. The policy may not require as a condition precedent to settlement or compromise of any claim the consent or acquiescence of the policyholder. The board may own or assign any annuity purchased by the board to a company licensed to do business in the state;

(P) Refuse to provide insurance coverage for individual physicians whose prior loss experience or current professional training and capability are such that the physician represents an unacceptable risk of loss if coverage is provided;

(Q) Terminate coverage for nonpayment of premiums upon written notice of the termination forwarded to the health care provider not less than thirty days prior to termination of coverage;

(R) Assign coverage or transfer insurance obligations and/or risks of existing or in-force contracts of insurance to a third-party medical professional liability insurance carrier with the comparable coverage conditions as determined by the board. Any transfer of obligation or risk shall effect a novation of the transferred contract of insurance and if the terms of the assumption reinsurance agreement extinguish all liability of the board and the State of West Virginia, such extinguishment shall be absolute as to any and all parties; and

(S) Meet and consult with and consider recommendations from the Medical Malpractice Advisory Panel established by the provisions of article twelve-b of this chapter.

(d) If, after September 1, 2002, the board has assigned coverages or transferred all insurance obligations and/or risks of existing or in-force contracts of insurance to a third-party medical professional liability insurance carrier, and the board otherwise has no

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covered participants, then the board shall not thereafter offer or provide professional liability insurance to any health care provider pursuant to the provisions of subsection (c) of this section or the provisions of article twelve-b of this chapter unless the Legislature adopts a concurrent resolution authorizing the board to reestablish medical liability insurance programs.

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